

CURRENT DEVELOPMENTS

Is there a positive obligation on Russia to legalise same-sex unions under the European Convention on Human Rights?

The communicated case of *Fedotova and Shipitko v. Russia*

CILEM SIMSEK — 21 September, 2016



On 2 May 2016, the European Court of Human Rights communicated the case of *Irina Borisovna Fedotova and Irina Vladimironova Shipitko v. Russia* (no. 40792/10). The

complaints lodged by three same-sex couples concern the inability of same-sex couples to register for marriage under Russian legislation and the lack of other means of giving legal status to the relationship of same-sex couples, as marriage is the only legally recognised union in Russia. The Russian Register Office had dismissed the couples' numerous attempts to register for marriage, stating that Article 1 of the Russian Family Code required "voluntary consent of a man and a woman", thus limiting the marital union to couples of different sexes. The applicants complain under Article 8 (right to private life and family life) of the European Convention on Human Rights and under Article 14 (the prohibition of discrimination) of the Convention taken in conjunction with Article 8 of the Convention that the impossibility to enter marriage and the lack of other possible means to gain legal recognition for their relationship is discriminatory and violates their right to private and family life.

Communicated questions to the parties

The main legal questions arising from the refusal to register same-sex couples in Russia concern the violation of the applicants' right to respect for their private and family life, contrary to Article 8 of the Convention. The Court, however, went further in this case and asked the Russian Federation if the applicants were able to have access to a legal framework providing with official recognition of their unions "comparable to that guaranteed by the State to different-sex couples". Moreover, it raised the question if the applicants should be afforded the possibility to have their relationship recognised by national law and, if not, what reasons existed under Russian law for preventing such recognition. Additionally, the Court asked if the legal recognition of same-

sex unions imposed an “excessive burden” on the Russian State.

The ongoing debate on the recognition of same-sex relationships in Europe

With regard to the question if member states of the Council of Europe should be obliged to take steps to legally recognise same-sex relationships, the case of *Fedotova and Shipitko v. Russia* precisely addresses the issue if states are required to opening up civil marriage or providing for a statutory registration scheme. The communicated case is thus a reflection of the ongoing debate on the recognition of same-sex relationships. A closer look to national jurisdiction would go beyond the scope of this post. However, a short look at the legislation of the member states shows that members of the Council of Europe make a distinction between marriage and registered partnerships. Political developments, religion and culture play a considerable role when assessing the topic of legal recognition of same-sex relationships. As a result, private international law approaches of the member states in respect of same-sex relationships differ to a large extent, mainly dividing Europe in four geographical parts, namely Northern, Central, Southern and Eastern Europe (for the overview see Katharina Boele-Woelki and Angelika Fuchs (eds), *Legal Recognition of Same-Sex Couples in Europe: National, Cross-boarder and European Perspectives*, Fully revised 2nd Edition, 2012 Cambridge, p. 19-86).

The European Court of Human Rights and its approach on the recognition of same-sex relationships

In the light of the current turbulent debate surrounding same-sex relationships, it is helpful to look at the current approach of the European Court of Human Rights on the

recognition of same-sex relationships. A significant milestone with respect to the legal recognition has been made in 2010, namely with the judgment Schalk and Kopf v. Austria (judgment of 24 June 2010, no. 30141/04). There, the Court considered the recent developments across Europe when ruling on the question if the right to marry should be extended to same-sex couples. The Court ruled that the “right to marry” denoted the traditional union between a man and a woman (para. 49). It thus granted Austria a wide margin of appreciation and rejected the applicants’ claim to oblige Austria to provide legal recognition for same-sex couples, whether through marriage or other institution. The case is still considered the most recent and leading case regarding the right of same-sex couples to marry pursuant to Art. 12 of the Convention. Moreover, it was the start of a more active involvement of the Court with the increasingly pressing topic of same-sex relationships. In 2013, the Court in Vallianatos and others v. Greece (judgment of 7 November 2013, nos. 29381/09 and 32684/09) refined its approach on the legal recognition of same-sex couples. It ruled that the blanket exclusion of same-sex couples from registering a ‘civil union’ violated rights protected by Article 14 taken in conjunction with Article 8 of the Convention (para. 75). Nevertheless, the Court again did not judge that the Convention would in itself oblige a state to offer the status of a civil union to homosexual couples. It was only last year that a stepping stone towards the full legal recognition of same-sex couples has been made, namely with the judgement Oliari and others v. Italy (judgement of 21 July 2015, nos. 18766/11 and 36030/11). There, the Court ruled that the absence of a legal framework recognising homosexual relationships violated the right to respect for private and family life pursuant to Article 8 of the Convention. Moreover, it held that the Italian government had failed to fulfill its positive obligation to

provide a specific legal framework offering recognition and protection of same-sex unions (para. 185).

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The communicated case of *Fedotova and Shipitko v. Russia* raises similar questions under Article 8 of the Convention. The central issue, which arises from the recent case-law of the Court, concerns the scope of positive obligations which the Court can impose on the member states of the Council of Europe. Up to now, Russia does not recognise same-sex marriages or other forms of civil unions. However, the Russian Family Code does not explicitly prohibit same-sex marriage and neither does Art. 14 of the Family Code list the union of a couple of the same-sex as a circumstance that prevents marriage. In the context of a number of homophobic provisions under Russian law, such as the prohibition of the promotion of homosexual activity to minors, it has been widely noticed that same-sex couples have been confronted with serious legal and social difficulties in Russia. In the context of LGBT rights in Russia, the case of *Fedotova and Shipitko* is of great importance, not least because it raises the question of what the Court can do to protect the relationship of homosexual couples.

There is no doubt that, should the Court eventually condemn Russia's refusal to register same-sex unions for marriage as being incompatible with Article 8 and 14 of the Convention, the case of *Fedotova and Shipitko* will become a leading case for the LGBT communities in Europe. By referring to a legal framework comparable to that of a heterosexual model of marriage, the Court, however, only asks if there are possibilities within the framework of

Russia's family law that grant homosexual couples rights comparable to that of heterosexual ones. The Court is not placing an excessive burden on the state, nor does it bring same-sex marriage at all in the public field. The communicated case can therefore be seen as an attempt by the Court to emphasise the 'private' dimension of same-sex relationships without interfering in the state's right to regulate family law in accordance with the national understanding of the concept of family and marriage.

Cilem Şimşek is a research fellow at the Chair for Public Law, Public International Law and Comparative Law (Prof. Dr. Stefan Oeter) at the Institute of Public and International Affairs of the University of Hamburg.

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